

SUBJECT: Felony for touch-screen voting machine tampering to change outcome

COMMITTEE: Elections — favorable, without amendment

VOTE: 6 ayes — Denny, Anchia, Anderson, Hughes, J. Jones, T. Smith

0 nays

1 absent — Bohac

WITNESSES: For — Don Alexander, Texas Association of Election Administrators;
(*Registered, but did not testify:* Cliff Borofsky, Bexar County; Mary
Finch, League of Women Voters of Texas)

Against — (*Registered, but did not testify:* Robert Howard, Libertarian
Party of Texas)

On — (*Registered, but did not testify:* Ann del Llano, ACLU of Texas;
Fred Lewis, Campaigns for People)

BACKGROUND: Under Election Code, sec. 121.003 (17), a "direct recording electronic
voting machine" (DRE) is a voting machine designed to allow a direct
vote on the machine by the manual touch of a screen, monitor, or other
device and that records individual votes and vote totals electronically.

DIGEST: HB 56 would amend Penal Code, ch. 33, to make it a first-degree felony
(life in prison or a sentence of five to 99 years and an optional fine of up to
\$10,000) to access a DRE voting system, affect the votes lawfully cast or
counted, and affect the outcome of the election.

An element of the offense would be access that prevented a voter from
casting a vote lawfully, changed a lawful vote, prevented a lawful vote
from being counted, or caused an unlawful vote to be counted.

The outcome of the election would be affected if the offender's actions
changed who won the election, or if it altered whether a candidate received
a required majority of votes, qualified for a runoff, or received enough
votes to cast lots for a runoff, or if it changed whether or not a measure
was adopted. An offense would not require that the votes affected by

tampering actually be used in the official determination of the election outcome.

Accessing a DRE system with the intent to change an election outcome would be a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000).

The bill would take effect September 1, 2005, and would apply to an offense committed on or after that date. If any element of an offense occurred before the effective date, that offense would be committed before the effective date. An offense committed before the effective date would be covered by laws in effect when the offense was committed.

**SUPPORTERS
SAY:**

HB 56 properly would create a felony offense for tampering with DRE voting machines to change, or attempt to change, the outcome of an election.

The Elections Committee heard testimony during the interim on fears about potential tampering with DREs by people hacking into the voting systems or planting hidden codes in software. Although the Elections Committee's Interim Report to the 79th Legislature refers to malfunctions in other states – where machines recorded incorrect votes or undervoted, or where deficiencies in the certification process made tampering possible – to date no evidence of fraud, attempted fraud, or alleged fraud has arisen in connection with a DRE in Texas. Currently, 13 of 254 counties are using DREs for disabled voters, early voters, or countywide voters. It is unclear whether current law on tampering with ballot boxes would apply to accessing DREs improperly.

Penalties that apply to election fraud under current law refer to "ballots" and "ballot boxes." Unlike some other voting systems that use paper ballots or have a voter verifiable paper audit trail (VVPAT), election results on DREs, or touch screen voting machines do not have physical ballots or ballot boxes but electronic data.

HB 56 would address concerns about fraudulent access to DREs and would improve voter confidence in these systems. Hacking a secured DRE would require more forethought and effort than stuffing a ballot box, and the number of votes affected at once could be considerably more than the votes in one ballot box. For these reasons, HB 56 appropriately would apply a felony punishment to the crime of tampering with DRE voting

machines to change election outcomes. Offenses short of changing or attempting to change an election outcome by tampering with DREs could be addressed adequately under current law on computer crimes.

OPPONENTS
SAY:

HB 56 as written could be difficult to enforce because of potential confusion over the meaning of "outcome of the election," which is not defined precisely anywhere else in statute and would be the threshold for a first-degree felony. This could confuse the standard for a criminal offense and make prosecution impractical. Also, under this legislation, someone who intended to change the outcome of an election by tampering with DREs could be charged with a lesser offense of a third-degree felony if, for example, mail ballots ultimately altered the winner.

If "outcome of the election" were tied to who won, the bill would be more likely to affect down-ballot races without reaching statewide elections. It is highly questionable whether someone who successfully skewed election results by hacking into a DRE in a MUD district should serve life in prison or five to 99 years. Under existing laws for computer crimes, such an offense arguably could be considered a class B misdemeanor (punishable by up to 180 days in jail and/or a maximum fine of \$2,000).

OTHER
OPPONENTS
SAY:

Public sentiment, as well as recently enacted federal law, has placed pressure on the states to ensure the integrity of the voting process. HB 56, by tying an offense to an election outcome, would not go far enough. Any fraudulent DRE access that altered an election, whether it ultimately changed the winner or not, should be a felony.

Tampering with DRE voting machines should be an offense even if it stopped short of affecting the outcome of an election. Tampering with DREs in certain statewide races could have far-reaching consequences short of changing the winner – affecting, for example, qualifying petitions for district, county, or precinct offices or for state ballot access in U.S. presidential elections based on the number of votes cast for governor in the last election. Major national political parties also base the number of convention delegates on the number of votes received by the party's gubernatorial candidate in the most recent governor's race. Changing the vote totals, but not the outcome, could affect these areas greatly.

NOTES:

The companion bill, SB 475 by Ellis, has been referred to the Senate State Affairs Committee.

